

Monday, 22 July, 1946

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INTERNATIONAL MILITARY TRIBUNAL
FOR THE FAR EAST
Chambers of the Tribunal
War Ministry Building
Tokyo, Japan

PROCEEDINGS IN CHAMBERS

On

APPLICATION UNDER RULE 6 b (1) OF THE RULES
OF PROCEDURE OF THE INTERNATIONAL MILITARY
TRIBUNAL FOR THE FAR EAST.

- - -

Before:

HON. SIR WILLIAM WEBB, President
of the Tribunal and Member from
the Commonwealth of Australia.

Reported by:
Samuel Goldberg.

Appearances:

For the Prosecution Section:

MR. JUSTICE A. J. MANSFIELD, Associate
Counsel, acting on behalf of the
Commonwealth of Australia;

MR. KENNETH N. PARKINSON

For the Defense Section:

MR. GEORGE A. FURNESS

For the Office of the General Secretary, IMTFE:

MR. G. WALTER BOWMAN,
Clerk of the Court

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THE PRESIDENT: I understand this is an application under the terms of an earlier application which was withdrawn under misapprehension relating to the affidavits and reports taken with respect to prisoners of war.

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MR. FURNESS: I can't find them, sir. I suggest it be adjourned.

THE PRESIDENT: They weren't notified?

MR. FURNESS: I don't know. I have not been able to find Mr. Williams and Mr. Cunningham.

(Addressing Clerk of the Court) If you say they were, I guess they were.

CLERK OF THE COURT: I personally left the notice down in their office and talked to them.

MR. FURNESS: The impression was that there was a meeting of all defense counsel here but I don't think it is --

THE PRESIDENT: Well, I will adjourn to when, four o'clock?

MR. FURNESS: Yes, sir.

MR. JUSTICE LANSFIELD: Four o'clock this afternoon.

(Whereupon, at 0910, the meeting was adjourned to 1600, 22 July, 1946.)

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(Whereupon, at 0910, the meeting was adjourned to 1600, 22 July, 1946.)

(The hearing reconvened at 1600 pursuant to adjournment.)

THE PRESIDENT: We will start again. This is a renewal of an application withdrawn on the 17th of July by consent of the Tribunal given by the President. The application relates to documents including affidavits and statements and reports of persons who were prisoners of war, civilian internees and inhabitants of territories occupied by the Japanese forces. Who is the applicant, Mr. Justice Mansfield?

MR. JUSTICE MANSFIELD: I have nothing further to add to what has already been said on the previous application. The withdrawal of the other application was caused by the fact that it was brought on in Chambers and I was not present. Mr. Williams was present for the prosecution and he agreed to withdrawal of the application without realizing the full effect of what he was doing. One will notice that there is not only affidavits, statements and reports. There are certain official A. T. I. S. reports and the third one is a dossier concerning examination of the case against Kunito Hatakeyama and Ken-ichi Nakagawa. This is a transcript of proceedings 354 pages in length in the English version and contains, in addition to the excerpts which the prosecution intends to use, plans and evidence which can in no way assist the Tribunal. The said excerpts contain the complete evidence of the two Japanese who were eye-witnesses of the massacre of prisoners of war

at Laha, Ambon, and are 50 pages in length.

The A. T. I. S. reports, these documents average approximately 100 pages each and the excerpts intended to be used by the prosecution amounts to about one page from each report.

I point out further in regard to the A. T. I. S. reports that they deal with a number of other matters than matters to which reference is being made by the prosecution. They deal with other areas and they deal with other subject matters. The whole of the documents will, of course, be available. They will be filed with the Secretariat in each case and they will be available for perusal by the defense.

In regard to Number Three, the Japanese translation of the whole of the proceedings as well as the English translation of the whole of the proceedings will be lodged with the Tribunal. The original, of course, was in Japanese and the Japanese Government translated the whole of it at the request of S. C. A. P. into English. I have nothing further to add to the original application on the affidavits. I think all of the arguments were advanced at that time.

MR. LOGAN: The original application that was made, if it please your honor, was withdrawn, I believe, on representation of Mr. Williams, and the prosecution was about to complete making copies

of all of these affidavits in accordance, strictly in accordance with rule 6(b)(1); and if that is so, that they are all copied, I see no reason why rule 6(b)(1) should not be complied with. And if that is not so, I don't see why the order originally entered by the Court on the original motion which was subsequently withdrawn should not be adhered to. That is with respect to Item One on this motion.

MR. JUSTICE MANSFIELD: With respect to that, it is not correct that the affidavits have been copied in full. None of them have been copied. The prosecution has been waiting for the decision of the Court before the affidavits, any further affidavits were copied either by way of excerpt or completely. No affidavits have yet been copied in full.

On the original order made by the Court there was a portion of the order requiring the original of the affidavit to be filed one month before the excerpts were required to be used. If that had been done, it would have been impossible for the prosecution to make any copies at all. The only one copy they have is the original which would have been filed in Court one month before the excerpts were to be used and that would have prevented the original being available for the purpose of copying. That was why the matter was brought on for reconsideration and, as I have already stated, Mr. Williams was under a

misapprehension when he said that the affidavits had been copied in full.

MR. LOGAN: Well, that being so, in view of the mistake made by Mr. Williams, may we respectfully suggest that the original order of the Court be again entered on this and with objections of the defendants previously made to the previous motion being deemed to have been made to this motion?

THE PRESIDENT: Yes. We will take the argument on the earlier motion as the argument on this and the matter will now be considered by the Tribunal. That is the only action to take. The withdrawal apparently was due to a misapprehension on the part of Mr. Williams.

MR. LOGAN: With respect to Item Number Two, I don't believe we have been served with a copy of this document so I don't know that we are in a position to say just what objections we really have to it unless they are the excerpts intended to be offered which are totally unrelated to any other part of the complete document. And we would appreciate the opportunity of seeing the complete document so that we can judge as to what opposition we will make to it.

With respect to Item Three, the dossier of the examination of case of two Japanese, I assume that the prosecution are referring here to both direct and cross-examination of these two witnesses.

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MR. JUSTICE MANSFIELD: That is complete evidence.

MR. LOGAN: Is there any other part of that record which would be material and bearing on the evidence that they gave?

MR. JUSTICE MANSFIELD: Well, as far as I am aware, there apparently was a fishing expedition, a sort of preliminary investigation, and a number of other witnesses were called, some of whom knew nothing whatever about the matter; and the whole of the transcript, of course, in English and in Japanese, will be lodged with the Tribunal and copies will be made of the complete evidence of these two people. They are the only two persons who were eye-witnesses of what occurred. They were questioned in these particular proceedings.

THE PRESIDENT: Well, I think I had better refer the whole matter to all the judges. I can hardly deal with those two by myself because they may think they are in the same plane as the earlier matter so I will refer the whole matter back to the judges.

MR. JUSTICE MANSFIELD: If the Court desires to see A. T. I. S. reports or dossier, they can be furnished to the Court for consideration.

MR. LOGAN: May we suggest that you let us have an English translation of Number Two and Three

so that they can be examined before it is argued before the Court?

MR. JUSTICE MANSFIELD: We can let you see them. We only have the one copy of each document.

MR. LOGAN: Well, you realize it is difficult to argue on a motion unless you know what you are talking about.

MR. JUSTICE MANSFIELD: Yes, I realize that.

MR. LOGAN: May we have that, your Honor?

THE PRESIDENT: Well, can you provide that, Justice Mansfield?

MR. JUSTICE MANSFIELD: We only have the one copy of each particular document, one copy of the dossier.

THE PRESIDENT: Can it be inspected in your office?

MR. JUSTICE MANSFIELD: Yes, it can be inspected.

MR. LOGAN: Will you let me know when you can have them available?

THE PRESIDENT: You will consent to the inspection. We will hold the other matters for the judges.

MR. PARKINSON: If I may propose here, your Honor, a form of order pursuant to a motion or application which was filed on the first or second and heard the morning of the fifth and afternoon of the

fifth. At that time it was continued for further consideration and I have conferred twice, on the eighteenth and nineteenth, with two of the counsel from the defense. I just had an opportunity to submit to Mr. Logan and Mr. Cunningham a copy of this proposal. So far as I can determine, it is in accordance with our understanding.

MR. LOGAN: Well, we have gone over this matter with Mr. Parkinson and several of the prosecution attorneys. With respect to Items Two, Three, Four, Five, Six, Ten, Twelve, Sixteen, we have suggested that a representation be made by the prosecution that the excerpts that they wish to offer have no relation to the balance of the documents referred to. And I notice in the order submitted that prosecution has included a phrase or clause: "It is ordered that said portions asked to be read," -- that is, of all of the documents, "be so read in evidence and that this order issue as of the present date."

I wish to point out that the application also asks for that relief.

Now, of course, it seems to me that it was improper. What they should have asked for was for relaxation of 6(b)(1) because if this order was signed as drawn, it would mean that the defendants would lose their right to object to the materiality or relevancy

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of these particular excerpts at the time they were offered in evidence at the trial. It specifically says: "It is ordered that such portions asked to be read be so read in evidence."

Now I also wish to point out to your Honor with respect to the excerpts or extracts from the interrogations of the four of the accused mentioned in items 18, 19, 20 and 21, that the defense are certainly entitled to a complete Japanese translation of those excerpts. It is very vital to the Japanese attorneys that they receive these interrogations which were taken of the accused in their own language so that they will be able to take it up with their clients.

You will recall that there has been a previous motion made and an order entered that the English translation of these interrogations of all of the accused be filed with the Secretariat and that the defendants' attorneys have the right to withdraw them upon the signature of Commander Harris, but there is no provision made as yet with regard to Japanese copies of those and I think it is vital to the defense of the Japanese accused that counsel be provided with Japanese translations of that before the prosecution offers any of the excerpts in evidence.

MR. PARKINSON: May I state with relation to the latter comment, Mr. Logan, that I seriously doubt that

any of the interrogations have been translated in full. Some of them run into volumes and I don't think that any rule so far issued specifies that that shall be done.

MR. LOGAN: That is right.

MR. PARKINSON: As I understand now, your proposal is that that be done.

MR. LOGAN: Well, my proposal is in opposition to your motion to do otherwise than what I have just suggested.

MR. PARKINSON: I wouldn't care to comment. From the standpoint of prosecution, you perhaps can do that better, Judge, as to the problem of translating an entire interrogation.

MR. JUSTICE MANSFIELD: Well, the entire interrogation has not been translated into Japanese, only the portions which are being used as excerpts are being translated into Japanese and the one particular interrogation would be almost impossible to translate. It took place on, I understand, fifty-one different days, the interrogation of one of the defendants, and runs into thousands of pages. It is an enormous volume. The complete English copy, of course, would be lodged in accordance with the order of the Court and the excerpts which will be used will be filed in accordance with the rules of the Tribunal and the orders of the Court. It will be almost impossible a job to translate

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all of the interrogations or any of the interrogations entirely into Japanese.

THE PRESIDENT: Well, each Japanese has an American counsel who will be able to see from the English what questions and what answers are material. He might have those put into the Japanese language. He might even get the help of the prosecution.

MR. WARREN: There are some that do not have American counsel.

THE PRESIDENT: There will be enough American counsel to cover the whole ground.

We might have to make special provision in the case of those Japanese who haven't American counsel. American counsel would see from the English what questions and answers are important and he can get those translated into Japanese. That ought to be sufficient.

MR. WARREN: Sometimes it is extremely difficult even to confer with our Japanese counsel. It is again a language difficulty, a question of being able to get an interpreter. We have some interpreters. Some of them are not very good and we have extreme difficulty on occasions. I think there are only two of our counsel who speak Japanese fluently and the rest of us not at all. But we realize the difficulty they are under, but we are under a terrific burden there.

THE PRESIDENT: I appreciate that.

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THE PRESIDENT: I appreciate that.

MR. LOGAN: I think these interrogations, if

your Honor please, should be treated entirely different than any of the exceptions from Rule 6(b)(1) because they are statements made by the accused. They are vitally interested in those statements. They have never seen copies of those before. They were never shown to the accused after they were taken. They were not signed by the accused. I think it is very vital that they be given those interrogations above anything else in this case as to the statements that they made to the prosecution. And they should be given to them in a language they understand.

MR. WARREN: You see, your Honor, those are never in Japanese. It was spoken in Japanese, translated into English, and the most it possibly could amount to is purported statement of the accused which, of course, is acceptable before the Tribunal. And then when we pick out what we have and try to get it translated back and get it to the accused, very, very often we don't have anywhere near the true meaning. It is extremely difficult and, on the statement of the accused, I think we are in order to insist, if possible, that on the statements of the accused, that they, if they saw fit to take fifty-one days of testimony, they certainly should have seen fit to fix it so we could have it. They had no manner of knowing at that time, I don't think, that there would be American counsel or English-speaking counsel present, and, of course,

hindsight is better than foresight sometimes, but it does appear that they could prepare those and we need them vitally. It is of vital importance.

THE PRESIDENT: Of course, they didn't keep the exact words the Japanese used in those interrogations and they are no more capable of giving you a translation back to Japanese, a reliable translation, than you are.

MR. WARREN: Well, I agree, but if we have the translation, then the Japanese counsel can show us wherein the meaning is different, if it is. Sometimes it makes a vast difference.

MR. LOGAN: It may very well be, your Honor, that the interpreter who took these interrogations is still available and he certainly should remember the Japanese words that were used by the accused.

MR. PARKINSON: It is true in instances only.

MR. JUSTICE MANSFIELD: Again, probably because these interpreters in consequence of the request of the defense have interpreted millions of words and for them to remember what the exact words were that were used by the particular person interrogated back in December is rather asking the impossible.

THE PRESIDENT: Well, I don't feel inclined to make that order, Mr. Logan, but it may be that if you, having read the English, you find that there are certain portions you would like translated into Japanese, the

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Court may be able to assist you.

MR. LOGAN: Well, how about the two Japanese accused without American counsel? Is your Honor going to make an exception as to that at least?

THE PRESIDENT: Well, we may have to think of something else in that case.

MR. LOGAN: Because it is very difficult.

THE PRESIDENT: Is that the only alternative, to give a full translation into Japanese of the statement?

MR. LOGAN: Well, it would be very difficult for any other American counsel to work on those two cases without a full knowledge of the facts involved.

THE PRESIDENT: They were offered American counsel and if they don't want American counsel, I don't know that we have any obligation in their case to insure that they will not be prejudiced by their own obstinacy.

MR. LOGAN: Well, the only thing I can say in answer to that, your Honor, is that the absence of American counsel, I believe under the Charter that it is required that the trial be conducted in a language which the accused understands. I mean, I am not authorized to speak for those two Japanese who have not got American counsel, but I think in all fairness to them, it should be done our way.

THE PRESIDENT: Well, we may have to follow

the Charter in that respect. I mean the Charter may compel us to give them a full translation. Nobody represents them here. Their counsel isn't here.

MR. FURNESS: Yes.

THE PRESIDENT: Dr. KIYOSE?

MR. YAMAKA: Mr. OKAMOTO.

THE PRESIDENT: Does he represent any Japanese accused who hasn't American counsel?

MR. OKAMOTO: Dr. KIYOSE representing TOJO.

MR. FURNESS: Do you want me to go out and see if he is here?

THE PRESIDENT: I have no doubt Dr. KIYOSE reads English. He is a Japanese counsel who understands English. When he gets the English copy, he will know exactly what matters and won't need this assistance you are trying to get for him today.

MR. WARREN: The other one, it is the other one.

THE PRESIDENT: Dr. KIYOSE represents all of those.

MR. WARREN: He represents two clients.

THE PRESIDENT: I think Dr. KIYOSE is the solution. We will do for him what we will do for you. If you can show that certain questions and answers are very important, we might provide him with a Japanese translation but I cannot imagine if he will

need it, being a Japanese. Well, I don't think I can make any further order than that. Can you get such parts of the questions and answers as you think material translated by the prosecution? That means you have to approve the English first, make up your minds what is important, and then approach the Court for further, an order that those important parts be given to you in Japanese. I think that is as much as I can do, Mr. Logan. That will be the order.

MR. LOGAN: This last sentence will be stricken from the order.

MR. PARKINSON: I don't see as that affects the question of materiality. It frees it from any objection on the ground it is a portion.

MR. LOGAN: "be so read in evidence," I think that would preclude us from making any objection on the trial --

MR. PARKINSON: As to materiality?

MR. LOGAN: As to anything.

MR. PARKINSON: It is only objection on the ground that it is a portion.

MR. LOGAN: It does not say so.

MR. CUNNINGHAM: If you stop it at "documents," --

MR. LOGAN: It will have to be amended anyway to take care of this matter which has just been decided, brought up this afternoon. An order will have to be redrawn.

THE PRESIDENT: I think what they should ask for is liberty to read them saving all just exceptions. That is all they need. That will meet your requirement if they put it in that form. That is all they are asking, liberty to read saving all exceptions.

MR. LOGAN: That is right. Then an additional provision with respect to these items 18, 19, 20, 21, interrogations?

THE PRESIDENT: Yes, you are right.

MR. LOGAN: If your Honor please, I have a motion which has not been served on the prosecution. I just wondered whether prosecution would consent to arguing it at this time. I don't think they even have a copy of it.

THE PRESIDENT: What is the motion?

MR. LOGAN: It is a motion to amend the last section, last sentence of Section 6(b)(1) with respect to copies of Chinese documents and it almost follows the same argument that was presented in Court today with respect to oral testimony. That is, that the requesting that the prosecution provide Japanese and English translation of Chinese documents and using the word "and" instead of "or" as contained in the rule.

MR. PARKINSON: Presently it is sufficient, isn't it, Mr. Logan, if it is translated into one other language than the original Chinese? Do I get it your

point is now to make it compulsory to translate it both into English and into Japanese?

MR. LOGAN: Well, what brought this about was that the prosecution served English translations of a document and served the Japanese counsel with the Chinese document.

MR. PARYINSON: Well, that sounds like error.

MR. LOGAN: They all just didn't know what it was all about.

MR. FURNESS: If it is going to be read into evidence, it is going to save a great deal of time in Court if they serve copies to them.

THE PRESIDENT: Well, do you want further time?

MR. JUSTICE MANSFIELD: Yes. I have not seen it.

MR. LOGAN: I am just suggesting it.

THE PRESIDENT: I will take it tomorrow morning if the prosecution is prepared or do they want further time?

MR. JUSTICE MANSFIELD: I suggest the Court take it on Wednesday morning. It will give us tomorrow to deal with the matter.

CLERK OF THE COURT: Nine A. M., Wednesday.

THE PRESIDENT: I would like to see the counsel who saw me at the hotel about a fortnight ago.

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